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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Kathie Martin,

Plaintiff,

- against -

Dan Mazer, Anthony Hines, Larry Charles,
Peter Baynham, Monica Levinson, Jay Roach,
Todd Phillips, Everyman Pictures, Twentieth
Century Fox Film Corporation, One America
Productions, Inc., Gold/Miller Productions,
Springland Films, Dune Entertainment, LLC,
MTV Networks d/b/a Comedy Central, Dakota
North Entertainment, Inc., Four by Two
Production Company, Sacha Baron Cohen,
Todd Schulman, and John Does Nos. 1-5,

Defendants.

Index No. 08 CV 1828 (LAP)

**DECLARATION OF ADAM RICHARDS IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

I, ADAM RICHARDS, declare as follows:

1. My office represents Plaintiff Kathie Martin in the above-captioned action. I have personal knowledge of the facts and circumstances set forth herein.
2. Annexed hereto as Exhibit A are pages 4 through 9 of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, dated April 8, 2008; Psenicska v. Twentieth Century Fox Film Corp., et al; Case No. 07 Civ. 10972.

3. Annexed hereto as Exhibit B is a copy of pages 151-52 of Gritten: Halliwell's Film Video & DVD Guide 2008 (Harper Collins 2007).

I declare under the penalty of perjury under the laws of the United States of America and the State of New York that the foregoing is true and correct and that this Declaration was executed in New York, New York on June 6, 2008.

s/ Adam Richards

Adam Richards

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MICHAEL PSENICKSKA,

Case No.: 07 CIV 10972 (LAP)

Plaintiff,

-against-

**TWENTIETH CENTURY FOX FILM
CORPORATION, ONE AMERICA
PRODUCTIONS, INC., TODD LEWIS, and
SACHA BARON COHEN,**

Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT**

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ATTORNEYS FOR PLAINTIFF

ARGUMENT

I. EVEN IF ENFORCEABLE, THE CONSENT AGREEMENT DOES NOT COVER A WORK OF FICTION SUCH AS THE BORAT FILM

Defendant Todd Lewis Shulman¹ told Psenicska that his production company, One America Productions, Inc., was producing a “documentary about the integration of foreign people into the American way of life.” *Complaint* ¶ 13.

The cover letter for the Consent Agreement was consistent with Shulman’s description: “Thanks very much for your interest in appearing in our Film. We’re glad that you want to appear in the Film to share your views or insights with the public.” (The letter did not define word “Film.”) *Hansen Decl., Ex. A*. The reasonable inference to be drawn from these simple words is that Psenicska will be interviewed for the purpose of expressing a point of view on a specific subject or relating an experience – not for the purpose of being a straight man in a comedy routine.

The Consent Agreement itself (at ¶ 1) was also consistent with Shulman’s description: “The Participant agrees to be filmed and audiotaped by the Producer for a documentary-style film (the “Film”).” *Hansen Decl., Ex. A*. These words do not even hint at the true nature of the Borat film, and defendants cannot conjure new meanings for them. The word “documentary,” as an adjective, means “(of a movie, a television or radio program, or photography) using pictures or interview with people involved in real events to provide a factual record or report: *he has directed documentary shorts and feature films*”; as a noun, the word means “a movie or a television or radio program that provides a factual record or report.” *New Oxford American Dictionary* (Erin McLean, ed., 2d ed., New York: Oxford University Press, Inc. 2005). The word “-style,” as a suffix forming adjectives

¹ The Complaint does not mistakenly name this defendant as “Todd Lewis.” That was the name Shulman gave to Psenicska, and that was the name Shulman appeared to use when he signed the Consent Agreement, though some may discern the signature as illegible. *Hansen Decl., Ex. A*.

and adverbs, means: “in a manner characteristic of: *family-style* | *church style*.” *Id.* Therefore, the phrase “documentary-style film” means a work displaying the characteristics of a film that provides a factual record or report, and the Borat film is not such a work. A documentary chronicles actual people in actual events and by definition cannot be a work of fiction. A film made in the style of a documentary is based on facts that can be documented by reliable sources, and such a film does not contain fictional characters engaging in deliberately outrageous behavior to comedic effect. This obvious conclusion may be derived from the application of settled canons of construction. *See Bauersfeld v. Board of Educ. of Morrisville-Eaton Cent. School Dist.*, 46 A.D.3d 1003, 1005, 846 N.Y.S.2d 809, 811 (3d Dep’t 2007) (court “duty-bound” to “give words and phrases employed their plain meaning”); *Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 374, 832 N.Y.S.2d 197, 203 (1st Dep’t 2007) (words in a written contract “should not be unnaturally forced beyond their ordinary meaning”), *aff’d*, 10 N.Y.3d 25 (2008).

Applying only to a “documentary-style film” and making no reference to a work of fiction, the Consent Agreement by its terms does not apply to the Borat film.² *See Cahill v. Regan*, 5 N.Y.2d 292, 184 N.Y.S.2d 348 (1959) (a release may not be read to cover matters which the parties did not intend to cover); *Demaria v. Brenhouse*, 277 A.D.2d 344, 345, 716 N.Y.S.2d 99, 100 (2d Dep’t 2000) (same).

Defendants’ expression of “hope[] to reach a young adult audience by using entertaining content and features” does not lead to a contrary conclusion or even create a contrary impression. First of all, the phrase “entertaining content” is not a term of art and is not necessarily

² Defendants cannot be heard to say that the Borat film may be deemed a species of documentary. A true documentary is rarely a signatory to an agreement with the Screen Actors Guild, because actors do not appear in documentaries unless there are re-enactments of actual events. Containing no such re-enactments, the Borat film presented fictitious characters portrayed by paid professional actors who were SAG members.

understood to be limited to comedy or puerile satire. Many movie viewers, even young adults, would find a serious treatment of a topical issue to be entertaining. *See, e.g., Super Size Me* (2004, directed by Morgan Spurlock) (a demonstration of the physical and mental effects of consuming fast food and an examination of the food culture in America). Secondly, it's easy to list *bona fide* documentaries that a young adult audience would likely find entertaining: *Gimme Shelter* (1970, directed by Albert and David Maysles) (chronicle of Rolling Stones' 1969 tour, with much of the focus on the tragic concert at Altamont, California); *Let It Be* (1970, directed by Michael Lindsay-Hogg) (the recording of the Beatles' final album culminating in a performance by the band on the roof of Apple Records in London); *Woodstock* (1970, directed by Michael Wadleigh) (chronicle of legendary 1969 music festival); *The Last Waltz* (1978, directed by Martin Scorsese) (final concert of The Band); *Jazz On a Summer's Day* (1960, directed by Aram Avakian and Bert Stein) (1958 Newport Jazz Festival).

The phrase "documentary-style film" gave defendants the flexibility to produce a documentary in the style of any one of a number of sub-genres without having to answer to Psenicska about the method they chose to cover the topic of assimilating the foreign born into the American way of life. They could have followed the classic style of presenting archival footage mixed with interviews, as director Marcel Ophüls did in *The Sorrow and the Pity* (1972) (collaboration of France's Vichy government with Nazi Germany from 1940 to 1944; archival footage mixed with interviews of collaborators, resistance fighters, and observers). They could have varied the classic style by including dramatic re-enactments of actual events based on forensic evidence, as director Errol Morris did in *The Thin Blue Line* (1988) (arguing that a man was wrongly convicted for murder by a corrupt justice system in Dallas, this documentary combined dramatic re-enactments of the crime and the investigation with contemporaneous newspaper accounts and photographs of the case and with interviews of the suspects, defense counsel, and trial witnesses). They could have presented

their film in a news format in the style of CBS Reports, e.g., *Harvest of Shame* (1960, directed by Fred W. Friendly) (in this production broadcast on Thanksgiving, 1960, Edward R. Murrow reported on the plight of migrant farm workers in America). They could have followed the style of cinema verite, as directors Albert and David Maysles did in *Salesman* (1968) (Four relentless door-to-door salesmen deal with constant rejection, homesickness and burnout as they go across the country selling very expensive bibles to low-income Catholic families) and *Grey Gardens* (1975) (the bizarre and reclusive lives of Edith Bouvier Beale and her daughter Edie among cats and raccoons in a crumbling mansion in East Hampton). They could have included in their documentary-style film slow pans across sepia-toned photographs while professional actors read from news accounts, letters, or diaries – a technique used to interesting effect by Ken Burns in *The Civil War* documentary (1990).

At most, what defendants tout as a general release in the Consent Agreement, even if valid, pertains only to claims in relation to a “documentary-style film,” not a work of fiction like the Borat film. The so-called release in Paragraph 4 – by which Psenicska purported to waive “any claims against the Producer ... or anyone associated with the Film” – is limited by the definition of the “Film” in Paragraph 1. See *Morales v. Solomon Management Co.*, 38 A.D.3d 381, 382, 832 N.Y.S.2d 195, 196-97 (1st Dep’t 2007) (when “a release contains a recital of a particular claim, obligation or controversy and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby”) (citations omitted); *Kaminsky v. Gamache*, 298 A.D.2d 361, 361-362, 751 N.Y.S.2d 254, 256 (2d Dep’t 2002) (“if from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone”); *Vines v. Gen.*

Outdoor Adver. Co., 171 F.2d 487, 492 (2d Cir.1948) (Hand, J.) (“[I]n a release[,] words of general import, followed or preceded by words relating to specific claims, are, ceteris paribus, limited to the specific claims”).

Because Psenicska did not give his consent for the use of his image or the exploitation of his services in a work of fiction, he may pursue his claims in this action. *See Fitzgerald v. Fahnestock & Co.*, 850 N.Y.S.2d 452, 453-54 (1st Dep’t 2008) (“the settlement agreement and release between petitioner and Fahnestock, which contained a recital of petitioner’s action against Fahnestock and their desire to settle the action, but no reference to petitioner’s employment or his employment agreement, is not necessarily a general release”); *Blog v. Sports Car Club of America, Inc.*, 254 A.D.2d 65, 66, 678 N.Y.S.2d 609, 610 (1st Dep’t 1998) (release of negligence claims arising out of go-kart race does not cover claims involving the design, manufacture, or sale of the go-kart); *Lanni v. Smith*, 89 A.D.2d 782, 783, 453 N.Y.S.2d 497, 498 (4th Dep’t 1982) (release referring to specific claims does not cover all claims arising from same accident, because “There is no phrase indicating that the release covers all claims arising from the accident”).

The cases cited by defendants in which a claim for commercial misappropriation was explicitly covered by a release are, perforce, inapposite. *See Myskina v. Conde Nast Publications, Inc.*, 386 F.Supp.2d 409, 416 (S.D.N.Y. 2005) (“The purported oral agreement contradicts the plain language of the Release”); *Ruffino v. Neiman*, 17 A.D.3d 998, 1000, 794 N.Y.S.2d 228, 229 (4th Dep’t 2005) (“the alleged misrepresentations ... directly conflict with the terms of the written consent”); *Weil v. Johnson*, 2002 WL 31972157 (Sup. Ct. N.Y. Co.) (three “clearly worded” releases preclude claim under section 51 of the New York Civil Rights Law when the plaintiff’s “allegations are contradicted by the very face of the Release”). *Weil* is also distinguishable on another ground: The film in which the plaintiff appeared was exactly what had been orally described to him by the

producers – a documentary about the lives of children who had grown up very wealthy. Here, what both Todd Lewis Shulman and the Consent Agreement said about the documentary-style film and what was actually produced were two very different species of motion picture.

Defendants' strained interpretation of the Consent Agreement shows that they tried to write it to obfuscate, not elucidate – a point confirmed by Todd Lewis Schulman's signing a phony name. Defendants could have told Psenicska that he was being asked to appear in a motion picture portraying a fictional account of a staged journey across America by a fictional character whose *raison d'être* was to provoke base reactions from the unwitting. Of course, had they been forthright, defendants would have risked Psenicska's refusal to participate or risked the loss of spontaneity. Rather than face such risks, defendants chose to mask their intentions with outright lies and sleazy business practices. That choice, however, does not come without a consequence: Defendants cannot now impose their hidden intent on Psenicska. See *Gross v. Sweet*, 49 N.Y.2d 102, 110, 424 N.Y.S.2d 365, 369-70 (1979) ("In short, instead of specifying to prospective students that they would have to abide any consequences attributable to the instructor's own carelessness, the defendant seems to have preferred the use of opaque terminology rather than suffer the possibility of lower enrollment. But, while ... the law grudgingly accepts the proposition that men may contract away their liability for negligently caused injuries, they may do so only on the condition that their intention be expressed clearly and in unequivocal terms") (quotation omitted).

EXHIBIT B

HALLIWELL'S

THE ONLY FILM GUIDE THAT MATTERS

Film

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★★★★★ FILM REVIEW

DAVID GRITTEN

B feminists figures of fun? Essentially, this is *Candida Camera* – with the unwelcome addition of anti-Semitic jokes that leave an unpleasant taste. Baron Cohen is skilled at thinking on his feet in tricky situations, and unafraid to place himself in physical danger for the sake of a scene. But one wonders at his motives: Is this film a bracing tilt at political correctness, a smug, superior in-joke, or a calculated, cynical attempt to shock? Exasperatingly, it's a little bit of all three.

w Sacha Baron Cohen, Peter Baynham, Anthony Hines, Dan Mazer character Borat by Sacha Baron Cohen d Larry Charles ph Anthony Hardwick, Luke Geisbuhler m Erran Baron Cohen ad David Saenz de Maturana ed Peter Teschner, James Thomas.

☆ Sacha Baron Cohen (Borat), Ken Davitian (Azamat), Luenell (Luenell) BORAT: 'Jak sie masz? (How are you?) My name-a Borat. I like you, I like sex, is nice!' BORAT (ABOUT WOMEN SEATED BESIDE HIM AT DINNER): 'In my country, they would go crazy for these two [indicates minister's wife]. This one... not so much...'

'The brilliance of *Borat* is that its comedy is as pitiless as its social satire, and as brainy.' – Manohla Dargis, *New York Times*

'The more I think about the film, the less amusing it becomes.' – Jason Solomon, *Observer*

† Pamela Anderson appears uncredited as herself.

Ⓜ Adapted screenplay

The Border

US 1982 108m Technicolor Panavision Universal/RKO (Neil Hartley)

Ⓜ Ⓜ Ⓜ A Los Angeles cop joins the border patrol in El Paso and becomes involved in squalor, violence and double-dealing.

A rather solemn elaboration on a well-worn theme, with nothing very memorable except its excesses.

w Deric Washburn, Walon Green, David Freeman d Tony Richardson ph Ric Waite m Ry Cooder pd Toby Rafelson ed Robert K. Lambert

☆ Jack Nicholson, Harvey Keitel, Valerie Perrine, Warren Oates, Elpidia Carrillo

Border Incident

US 1969 93m bw

MGM (Nicholas Naylack)

Police stop the illegal immigration of labourers from Mexico.

Routine semi-documentary cops and robbers, well enough made.

w John C. Higgins d Anthony Mann ph John Alton m André Previn

☆ Ricardo Montalban, George Murphy, Howard da Silva, James Mitchell, Alfonso Bedoya

Border Radio

US 1987 84m bw

Coyote/Marcus de Leon

A punk rock musician goes on the run to Mexico after stealing money from a promoter who failed to pay him.

Probably a learning experience for those involved: the jerky narrative (one title reads '2 or 6 months later'), abrupt editing, deliberately inconsequential, improvised dialogue and unattractive acting suggest that its participants were determined to make a film but were uncertain of precisely how to do it.

w Allison Anders, Dean Lent, Kurt Voss ph Dean Lent m Dave Alvin

☆ Chris D., Luana Anders, Chris Shearer, John Doe, Dave Alvin, Iris Berry, Devon Anders, Texacala Jones

† The credits include: 'Many curses on: Those Who Tried To Thwart Us'.

Border River

US 1953 80m Technicolor

Universal-International (Albert J. Cohen)

In 1865, after stealing \$2m in gold from the Union to buy supplies for the South, a Confederate Major takes refuge in Zona Libre, a Mexican town controlled by a powerful outlaw, where others are determined to relieve him of the treasure. Western programmer that mixes action and romance in an unusual setting.

w William Sackheim, Louis Stevens d George Sherman ph Irving Glassberg m Joseph Gershenson ad Bernard Herzbrun, Richard H. Riedel ed Frank Fross

☆ Joel McCrea (Clete Matison), Yvonne de Carlo (Carmelita Carrias), Pedro Armendariz (General Calleja), Ivan Triesault (Baron Von Hollden), Alfonso Bedoya (Capt Vargas), Howard Petrie (Newlund), Erika Nordin (Annina Strasser), George J. Lewis (Sanchez), Nacho Galindo (Lopez), George Wallace (Fletcher), Lane Chandler (Anderson), Martin Garralaga (Guzman), Joe Bassett (Stanton), Salvador Baguez (General Robles), Felipe Turice (Pablo)

Border Shootout

US 1950 110m colour

Turner/Phoenix

A naïve rancher becomes the sheriff of a town in thrall to the crooked son of its largest landowner.

Jeep Western, in which the various strands of the narrative never quite come together; the acting is variable – from acceptable to bad – and the direction clumsy. Despite his star billing, Ford, whose mind seems to be on other things, plays a secondary role.

w C. T. McIntyre novel *The Law at Randado* by Elmore Leonard ph Dennis Dalzell m Coley Music Group pd Craig B. Stein ed Grant Johnson

☆ Glenn Ford, Charlene Tilton, Jeff Kaake, Michael Horse, Russell Todd, Cody Glenn, Sergio Calderon, Michael Ansara

Borderline

US 1980 97m colour

ITC (Martin Stanger)

A Mexican border patrolman chases illegal immigrants and the big time crooks making money out of them.

Routine, quite effective action programmer. w Steve Kline, Jerrold Freedman d Jerrold Freedman ph Tak Fujimoto m GE Melle ☆ Charles Bronson, Bruno Kirby, Karmin Murcelo, Michael Lerner, Ed Harris

Borderlines: see *The Caretakers*

Bordertown

US 1934 80m bw

Warner (Robert Lord)

In a North Mexican town, a shabby lawyer becomes infatuated with the neurotic wife of a businessman.

Satisfying melodrama whose plot climax was later borrowed for *They Drive by Night* (qv). w Laird Doyle, Wallace Smith

novel Carroll Graham d Archie Mayo

ph Tony Gaudio m Leo Forbstein

☆ Paul Muni, Bette Davis, Margaret Lindsay, Eugene Pallette, Robert Barrat, Henry O'Neill, Hobart Cavanaugh

'A strictly box office film, well written and paced.' – *Variety*

† *Blowing Wild* (qv) was also a partial uncredited remake.

Bordertown Cafe

Canada 1991 95m colour

Cineplex/Flat City/NFBC (Norma Bailey)

A woman running a small-town café has problems with her mother, son and truck-driving former husband.

Fraught and talkative soap opera of regrets and disappointments.

w Kelly Rebar d Norma Bailey ph Ian Elkin m Ben Mink pd John Blackie

ed Lara Mazur

☆ Susan Hogan, Janet Wright, Gordon Michael Woolvett, Sean McCann, Nicholas Campbell

Born Again

US 1978 110m Technicolor

Robert L. Munger/Frank Capra Jr

Charles Colson, sent to prison after Watergate, becomes a devout Christian. Part evangelism, part reconstruction through rose-tinted spectacles; not particularly entertaining or instructive as either.

w Walter Block d Irving Rapper ph Harry Stradling Jr m Les Baxter ☆ Dean Jones, Anne Francis, Jay Robinson, Dana Andrews, Raymond St Jacques, George Brent, Harry Spillman (Richard Nixon)

Born for Glory: see *Brown on Resolution*

Born for Trouble: see *Murder in the Big House*

Born Free

GB 1966 95m Technicolor

Panavision

Columbia/Open Road (Carl Foreman)/High Road/Atlas (Sam Jaffe, Paul Radin)

A Kenyan game warden and his wife rear three lion cubs, one of which eventually presents them with a family.

Irresistible animal shots salvage this rather flabbily put together version of a bestselling book. An enormous commercial success, it was followed by the even thinner *Living Free and To Walk With Lions* (qv), by a TV series, and by several semi-professional documentaries.

w Gerald L. C. Copley (Lester Cole)

book Joy Adamson d James Hill

ph Kenneth Talbot m John Barry

☆ Virginia McKenna, Bill Travers, Geoffrey Keen

† Screenwriter Cole wrote under a pseudonym because he was blacklisted at the time.

John Barry; title song (m John Barry, by Don Black)

Born in East L.A.

US 1987 87m colour

Universal (Peter Margregor-Scott)

An American Mexican is mistaken for an illegal immigrant and deported to Tijuana. Mercifully short brain-dead comedy.

w Cheech Marin ph Alex Phillips m Lee Holdridge ed Don Brochu ☆ Cheech Marin, Daniel Stern, Paul Rodriguez, Jan Michael Vincent, Kamala Lopez, Tony Plana

Born Losers

US 1967 112m colour

AIP (Deidre Taylor)

California teeny-boppers claim to have been gang-raped by wandering motorcyclists. Teenage shocker, only notable for its credits, and for being the first Billy Jack film.

w Tom Laughlin ph Gregory Sandoz m Mike Curb

☆ Tom Laughlin, Jane Russell, Elizabeth James, Jeremy Slate, William Wellman Jr

'It's so poky and crudely obvious that it seems almost guileless – helplessly inept.' – *Pauline Kael*

'A true story of innocence lost and courage found'

Born on the Fourth of July ***

US 1989 144m DeLuxe Panavision

UIFF/Exlan (A Kitman Ho, Oliver Stone)

A crippled Vietnam veteran joins the anti-war movement.

Rousing drama, based on fact.

w Oliver Stone, Ron Kovic book Ron Kovic d Oliver Stone ph Robert Richardson

m John Williams pd Bruno Rubeo ad Victor Kempster, Richard L. Johnson

ed David Brenner, Joe Hutshing

☆ Tom Cruise (Ron Kovic), Bryan Larin (Young Ron), Raymond J. Barry (Mr. Kovic), Caroline Kava (Mrs. Kovic), John Evans (Tommy Kovic), Seth Allen (Young Tommy), Jamie Talisman (Jimmy Kovic), Sean Stone (Young Jimmy), Anne Bobby (Susanne Kovic), Jenna von Oy (Young Susanne)

Oliver Stone; best film editing

Tom Cruise; John Williams; best picture; best adapted screenplay; best cinematography

Born Reckless

US 1937 60m bw

TCF

Big-town taxi drivers start a war among themselves.

Second-feature actioner, well enough done.

w John Patrick, Helen Logan, Robert Ellis d Malcolm St Clair

☆ Brian Donlevy, Rochelle Hudson, Ben MacLane, Robert Kent, Harry Carey, Paul Moore, Chick Chandler

'Houses in the knuckle districts will prove its best play.' – *Variety*

'Romance isn't dead... it's just not very well'

Born Romantic

GB 2000 97m DeLuxe

Optimum/BBC/Harvest/Kismet (Michele Camarda)

In London three young men pursue two women at a salsa club.

Episodic romantic comedy that is enjoyable fits and starts, though its over-schematic structure dampens the fun.

w David Kane ph Robert Alazraki m Simon Boswell pd Sarah Greenwood

ed Michael Parker

☆ Craig Ferguson (Frankie), Ian Hart (Second Cab Driver), Jane Horrocks (Mrs. Adrian Lester (Jimmy), Catherine McCormack (Jocelyn), Iini Mistry (Ellie David Morrissey (Pergus), Olivia Williams (Eleanor), Kenneth Cranham (Bamey), John Thomson (First Cab Driver), Paul Cosentino (Ray)

'Highly enjoyable when all its gears are clicking, but rarely as good as it should be.' – *Derek Elley, Variety*